No. 10-738

JAN 3 2011

In The
Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING PETITIONER

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MOTION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37(2)(b), the National Crime Victim Law Institute (NCVLI) submits this motion seeking permission to file an *amicus curiae* brief in support of Petitioners' Petition for Writ of Certiorari in the above-captioned case.

NCVLI sought leave of the parties to file the attached brief in support of Petitioners' Petition by email and telephone on December 22, 2010. On December 22, 2010, Jon M. Hopeman, on behalf of Thomas J. Petters, and Brenda Grantland, on behalf of Petitioners, consented to the filing. On December 23, 2010, NCVLI received notification from Fred Bruno, on behalf of Larry Reynolds, and Thomas B. Heffelfinger, on behalf of Harold Katz, that they were withholding consent to file. As of December 29, 2010, NCVLI had not received written confirmation of consent to file from any of the remaining parties, the date on which NCVLI submitted its brief to the printer.

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of

Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. NCVLI has an interest in this case because it has implications for the enforcement of all rights afforded to victims under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the rights to restitution and to effective review on appeal.

Respectfully submitted,

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Date: January 3, 2011

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. NCVLI believes that this case has important implications for the enforcement of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the rights to restitution and to effective review on appeal.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

The parties were notified ten days prior to the due date of this brief of the intention to file.

SUMMARY OF THE ARGUMENT

In this case, the crime victims filed a proper petition for review of a district court decision denying them restitution, which is a right guaranteed by the CVRA and other statutes. The Eighth Circuit denied the petition without explanation. This was done despite Congress' command in the CVRA that "[i]f the court of appeals denies the relief sought [by a crime victim under the CVRA], the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit's action directly contravenes the CVRA. Accordingly, this Court should summarily reverse the decision below and remand to the Circuit with direction that it comply with the requirements of the CVRA.

ARGUMENT

The CVRA specifically requires that "[i]f the court of appeals denies the relief sought [by a crime victim under the CVRA], the reasons for denial *shall* be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3) (emphasis added). Here, the Eighth Circuit flouted this requirement by issuing a summary denial without explanation. This contravened the plain language of the CVRA. Accordingly, the Court should summarily reverse the decision below. This Court should also write a brief opinion, providing guidance to the courts of appeals that the CVRA provision mandating written opinions must be

respected, and assurance to crime victims that their rights under the statute will be enforced.

The failure to provide "the reasons for the denial . . . in a written opinion" might seem like a mere technicality. But NCVLI has been involved in CVRA litigation around the country since passage of the Act, and can report that the lack of written decisions spawns serious problems. The field of crime victims' rights is a new and evolving one, and issues of how to enforce victims' rights are challenging federal and state courts throughout the country. *See generally* Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, VICTIMS IN CRIMINAL PROCEDURE 631-706 (3d ed. 2010) (reviewing numerous enforcement issues regarding crime victims' rights). As a result, crime victims attempting to protect their rights do not have the benefit of an established body of law interpreting their rights (in contrast, for example, to criminal defendants, who have a well developed body of case law about their rights). The CVRA's written opinion requirement addresses this lack of case law and is designed to create a body of precedents for future crime victims and courts

Congress' requirement of a written decision serves other purposes as well. If an appellate court explains in one case why a victim's assertion of rights was denied, a victim asserting rights in a subsequent case can avoid repeating errors made in the previous case. Here, for example, the victims have had several petitions summarily denied – and yet they are none the wiser as to why their petitions have been denied.

See Mandamus Petition at 8 (noting that because of previous failures of the court to provide a written opinion, the crime victims in this case were left to "guess" why their previous petitions had been denied). It is also important to remember that many victims of crime are indigent and lack legal counsel. Therefore, when, as in this case, a victim has skilled legal counsel who is able to bring a case to the appellate level, it is vital that the effort result in a written decision to benefit future crime victims who may be impecunious.

It was presumably for reasons such as these that Congress required appellate courts to produce a written opinion if denying victims' claims. Congress may have also thought that by compelling a written decision, appellate courts might more carefully work through novel issues surrounding crime victims' rights and avoid making mistakes.

The victims in this case specifically brought to the Eighth Circuit's attention 18 U.S.C. § 3771(d)(3)'s requirement of a written opinion. *See* Petition for Mandamus at 3 (quoting statutory requirement of written opinion), *id.* at 8 (noting previous failures by the court to comply with the requirement of producing a written opinion had left them "to guess" why they had been denied). Nonetheless, in clear contravention of the congressional command, the Eighth Circuit denied the petition without providing any reason – much less the "written decision" required in the CVRA.

The Eighth Circuit's failure to abide by the CVRA disrupted the appellate safeguards Congress created.

When it passed the CVRA, Congress made clear that it expected courts of appeals to act as protectors of crime victims' rights. During the floor debate on the CVRA, co-sponsor Senator Jon Kyl explained the importance of the CVRA's mandatory appellate review provision, stating: "[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights." 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004); *see also* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 Denv. U.L. Rev. 599, 625-29 (2009) (discussing the legislative history of the CVRA's appellate provisions).

The requirement of a written opinion by courts of appeals dovetails with another provision in the CVRA addressed to trial courts. The CVRA affords crime victims standing to enforce their rights in the nation's federal trial courts and requires these courts to afford victims their rights. 18 U.S.C. § 3771(b)(1). The Act then directs that "[t]he reasons for any decision denying relief under . . . [the CVRA] shall be clearly stated in the record." 18 U.S.C. § 3771(b)(1). The rationale underlying this requirement to have reasoning appear in the district court record was to ensure a proper record for appeal. *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("[R]equiring a court to provide the reasons for denial of relief is

necessary for effective appeal. . . ."). In this case, the district court properly complied with the requirement by giving reasons for rejecting the victims' claims. The entire review apparatus specified in the CVRA, however, is short-circuited by the Eighth Circuit's refusal to explain whether it agreed with the analysis of the district court below or whether it was rejecting relief for some other unexplained reason

While Congress properly did not draw distinctions between victims with significant claims and those with insignificant ones, it is important to note that the victims here had a huge stake in the disposition of their petition. The victims presented substantial claims that they had lost over $165 million dollars due to the defendant's fraud scheme. Under the CVRA and other statutes, they had both a guaranteed right to be heard, 18 U.S.C. § 3771(a)(4), and a right to "full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(7). These rights were denied in the district court, forcing the victims to seek appellate protection.[4] Whatever the ultimate merits of their

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[4] The district court felt it could deny the victims relief in this criminal case because they could pursue a later civil lawsuit. The merits of this conclusion are compellingly addressed by the victims in their petition for certiorari. NCVLI adds only that crime victims are often unable – both financially and emotionally – to participate in a civil lawsuit Financially, the cost of hiring a lawyer for a civil lawsuit is often prohibitive Emotionally, victims are harmed by delays in the final disposition of cases *See* Marilyn Peterson Armour & Mark S Umbreit, *The Ultimate Penal Sanction and 'Closure' for Survivors of Homicide Victims*, 91 Marq L Rev 381, 413 (2007) (noting that requiring victims

(Continued on following page)

claims to the Eighth Circuit, these crime victims were entitled by Congressional command to a written decision explaining the court's reasoning.

This Court could grant certiorari to review and ultimately rule upon the Eighth Circuit's refusal to follow the law; but this Court has recognized that summary reversal is appropriate for the unusual situation where "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). These conditions are all obviously and indisputably met here. The CVRA's requirement of a written opinion is not in doubt; what happened below is not in dispute; and the Eighth Circuit clearly erred in not providing a written explanation for its action. Further briefing and argument will not change or elucidate any of these facts. The Court should summarily reverse in a written opinion that will provide guidance to courts of appeals and give effect to Congress' command that crime victims are at least entitled to know why their appellate claims have been rejected.

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to endure proceedings over many years forces them to "relive the crime," which can "intensify the perception that the world is not fair or just."); Deborah P. Kelly, *Victim's Perceptions of Criminal Justice*, 11 Pepp. L. Rev. 15, 19 (1983) (noting that "[d]elay in court hinders the victim's recovery").

CONCLUSION

This Court should summarily reverse the Eighth Circuit's decision and remand with a direction to the Eighth Circuit that it comply with the CVRA's requirement that its reasoning for denying relief to the crime victims "shall be clearly stated on the record in a written opinion."

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